

**ANNUAL REPORT  
OF THE  
ADMINISTRATIVE RULES OVERSIGHT  
COMMITTEE**



**Indiana Legislative Services Agency  
200 W. Washington Street, Suite 301  
Indianapolis, Indiana 46204**

**November, 2008**

# INDIANA LEGISLATIVE COUNCIL

## 2008

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# ADMINISTRATIVE RULES OVERSIGHT COMMITTEE

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Chuck Mayfield  
Fiscal Analyst for the Committee

A copy of this report is available on the Internet. Reports, minutes, and notices are organized by committee. This report and other documents for this Committee can be accessed from the General Assembly Homepage at <http://www.in.gov/legislative/>.

## **I. STATUTORY AND LEGISLATIVE COUNCIL DIRECTIVES**

IC 2-5-18-4 establishes the Administrative Rules Oversight Committee ("the Committee") and gives the Committee oversight over the rules of most state agencies. IC 2-5-18-8 specifies that the Committee's oversight functions include the authority to do the following:

Sec. 8. (a) The committee shall receive and may, at its discretion, review a complaint filed by a person regarding a rule or practice of an agency.

(b) The committee may review an agency rule, an agency practice, or a failure of an agency to adopt a rule.

(c) The committee may recommend that a rule be modified, repealed, or adopted.

(d) When appropriate, the committee shall prepare and arrange for the introduction of a bill to clarify the intent of the general assembly when the general assembly enacted a law or to correct the misapplication of a law by an agency.

In addition, in the 2008 legislative interim, the Legislative Council charged the Committee with studying the following topic:

Whether all commissions created solely to review state agency decisions can be replaced with an "office of appeal" staffed by administrative law judges (Senator R. Young).

LEGISLATIVE COUNCIL RESOLUTION 08-01 (May 22, 2008).

## **II. INTRODUCTION AND REASONS FOR STUDY**

The Committee conducted a series of meetings during the 2008 legislative interim in order to consider and make recommendations on two issues:

(1) In accordance with IC 2-5-18-8(a), which provides that the Committee "shall receive and may, at its discretion, review a complaint filed by a person regarding a rule or practice of an agency," the Committee met to consider a complaint received concerning a rule adopted by the Natural Resources Commission (Commission) concerning the "taking" of coyotes.<sup>1</sup>

(2) As directed by the Legislative Council in Legislative Council Resolution 08-

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<sup>1</sup>The complaint, filed on September 9, 2008, by Gordon Ingle of Corydon, alleges that the Commission exceeded its statutory authority in amending 312 IAC 9-3-12(d) concerning the taking of a coyote on land by the person who possesses the land (or by another person designated in writing by the person who possesses the land).

01, the Committee met to study the issue of whether all commissions created solely to review state agency decisions can be replaced with an "office of appeal" staffed by administrative law judges.

### **III. SUMMARY OF WORK PROGRAM**

The Committee met three times after the conclusion of the 2008 session of the General Assembly. All three meetings were held at the State House in Indianapolis.

On September 23, 2008, the Committee conducted its first meeting to consider the following: (1) whether all commissions created solely to review state agency decisions can be replaced with an "office of appeal" staffed by administrative law judges; and (2) whether the Committee should further consider a complaint received about a rule adopted by the Natural Resources Commission (Commission) concerning the "taking" of coyotes. Both issues had been brought before the Committee at the behest of Senator Richard Young.<sup>2</sup> However, because Senator Young was not present at the meeting, the Committee members present agreed to reschedule the meeting to allow Senator Young to attend and provide more information concerning both issues. Members present also agreed that the Committee should indeed consider the complaint received about the Commission's rule concerning coyotes.

At its second meeting on October 13, 2008, the Committee received testimony from both the complainant and representatives from the Department of Natural Resources (DNR) on the Commission's adoption of the rule concerning the taking of coyotes. The Committee also received testimony on the issue of whether commissions created solely to review state agency decisions can be replaced by an "office of appeal" staffed by administrative law judges. The Committee's findings of fact and recommendations on both of these topics are summarized in this report.

At its third meeting on October 17, 2008, the Committee considered a bill draft<sup>3</sup> that would: (1) prohibit the sale or transfer of a live coyote that is captured or trapped at a location inside Indiana to a location outside Indiana; and (2) void the rule adopted by the Commission concerning the taking of coyotes. The Committee voted 4-3 in favor of recommending the introduction of the bill during the 2009 legislative session. However, the motion failed because the affirmative vote of five members of the Committee is required for the Committee to take any action.<sup>4</sup> The

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<sup>2</sup>The Legislative Council had assigned the topic of the creation of an "office of appeal" to the Committee upon Senator Young's request, and one of Senator Young's constituents (Gordon Ingle) filed the complaint about the Commission's rule concerning the taking of coyotes.

<sup>3</sup>PD 3385. See Exhibit 1.

<sup>4</sup>See IC 2-5-18-9(b).

Committee also reviewed, amended, and voted 6-1 to adopt a draft of a final report containing the Committee's findings of fact and recommendations on the following: (1) Whether all commissions created solely to review state agency decisions can be replaced with an "office of appeal" staffed by administrative law judges. (2) Whether the Commission exceeded its statutory authority in adopting the rule concerning the taking of coyotes, as alleged in the complaint filed with the Committee.

#### **IV. SUMMARY OF TESTIMONY**

##### **(1) Complaint concerning Commission's adoption of rule concerning coyotes:**

A. Gordon Ingle, the complainant, testified before the Committee on October 13, 2008. He introduced himself as an attorney and a farmer of 83 acres in Harrison County. Mr. Ingle stated his belief that in adopting LSA #07-749(F),<sup>5</sup> the Commission had exceeded its statutory authority to adopt rules regulating wild animals in Indiana.

In adopting LSA #07-749(F), the Commission amended an existing administrative rule, 312 IAC 9-3-12(d), concerning the "taking" of coyotes. Before being amended by the Commission, 312 IAC 9-3-12(d) had simply been a restatement of a statute first enacted by the legislature in 1987 and now codified at IC 14-22-6-12. Before its amendment, 312 IAC 9-3-12(d) had provided that "a person who possesses land, or another person designated in writing by that person, may take coyotes on that land at any time."<sup>6</sup> While the Commission's rule retained this language, it incorporated additional language that: (1) provides that a coyote taken on land by the person who possesses the land (or by another person designated in writing by that person) must be euthanized within 24 hours, if the coyote is taken from March 16 through October 14; and (2) places certain

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<sup>5</sup>LSA #07-749(F) was approved by the Governor and filed with the publisher of the Indiana Register and Indiana Administrative Code on July 31, 2008. DIN: 20080827-IR-312070749FRA (accessible at: <http://www.in.gov/legislative/iac/20080827-IR-312070749FRA.xml.html>).

<sup>6</sup>IC 14-22-6-12 similarly provides:

A person:

- (1) who possesses land; or
  - (2) designated in writing by a person who possesses land;
- may take coyotes on the land at any time.

restrictions on the possession and disposition of such a coyote.<sup>7</sup>

Claiming that the Commission had exceeded its authority in adopting these changes, Mr. Ingle argued that the General Assembly had intended to establish an "open season" on coyotes when it passed IC 14-22-6-12. According to Mr. Ingle, in placing restrictions on the possession and disposition of a coyote taken from March 16 through October 14, the Commission had thwarted the General Assembly's intent to allow a person who possesses land to take coyotes on that land "at any time." While acknowledging that the statutory definition of "take"<sup>8</sup> does not specifically include the actions prohibited by the Commission's rule, Mr. Ingle argued that the effect of the rule was to essentially limit a person's ability to take a coyote during the specified period by placing restrictions on what can be done with a coyote once it is taken.

B. John Davis, Deputy Director of the DNR, testified before the Committee on October 13, 2008. Mr. Davis explained that the DNR's Division of Fish and Wildlife had proposed the rule which was eventually adopted by the Commission. Mr. Davis reported that the DNR had been contacted by natural resources agencies in several other states about the problems that occur when coyotes are shipped across state lines. For example, Mr. Davis noted that coyotes that are trapped and transported live to another location have the potential to spread diseases such as mange, distemper, parvovirus, rabies, and heartworm. These diseases can infect coyote populations, other animals, and humans in the second state.

Addressing Mr. Ingle's contention that the Commission had exceeded its statutory authority in

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<sup>7</sup>As amended, 312 IAC 9-3-12(d) provides as follows:

(d) A person who possesses land, or another person designated in writing by that person, may take coyotes on that land at any time. **A coyote taken under this subsection from March 16 through October 14:**

**(1) must be euthanized within twenty-four (24) hours of capture; and**

**(2) shall not be:**

**(A) possessed for more than twenty-four (24) hours;**

**(B) sold;**

**(C) traded;**

**(D) bartered; or**

**(E) gifted.**

(Roman text indicates text in 312 IAC 9-3-12(d) before its amendment. Bold text indicates language added to 312 IAC 9-3-12(d) after its amendment by LSA #07-749(F).)

<sup>8</sup>IC 14-22-2-278 provides that for purposes of IC 14-22-2, "take" means: "(A) to kill, shoot, spear, gig, catch, trap, harm, harass, or pursue a wild animal; or (B) to attempt to engage in such conduct."

adopting LSA #07-749(F), Mr. Davis cited IC 14-22-2-6, which requires the Director of the DNR to adopt various rules to regulate and manage wild animals and exotic mammals in Indiana.<sup>9</sup> He disagreed with Mr. Ingle's assertion that the DNR's rulemaking authority granted under IC 14-22-2-6 was "trumped" by the General Assembly's enactment of IC 14-22-6-12.

C. Colonel Michael Crider, Director of Law Enforcement for the DNR, testified before the Committee on October 13, 2008, and October 17, 2008. He stressed the seriousness of the potential for the spread of disease when coyotes are transported across state lines. While the importation of live coyotes into Indiana<sup>10</sup> and many other states is illegal or restricted because of these disease concerns, there is an incentive for individuals to sell live coyotes in violation of these laws and regulations because of the monetary value placed on live coyotes. Colonel Crider explained that live coyotes are often sold across state lines for use in running enclosures that are part of dog training facilities. Because there is no "fair chase" within these enclosures, some coyotes are not just chased but killed by dogs within the enclosures. There is also the potential for coyotes to escape from the enclosures, creating problems for nearby landowners. He acknowledged that such enclosures are currently operating illegally outside the coyote season in Indiana.

D. Tim Maloney, Senior Policy Director for the Hoosier Environmental Council, testified before the Committee on October 13, 2008. He expressed the Hoosier Environmental Council's support for the Commission's adoption of LSA #07-749(F) and for the responsible regulation of wildlife in general. Mr. Maloney suggested that the issue addressed by the rule was the appropriateness of trading in wild animals.

E. Sandra Jensen, the hearing officer who presided over the Commission's rulemaking, testified before the Committee on October 17, 2008. She explained the respective roles of the DNR and the Commission in the rulemaking process and described the membership of the Commission. Ms. Jensen also informed that Committee that the Commission had recently discovered a discrepancy between the rule as it was published in her hearing officer's report, and the final version of the rule, as posted in the Indiana Administrative Code. She stated that the Commission had begun to explore its options for amending the rule through the procedures for

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<sup>9</sup>IC 14-22-2-6(a)(4) provides that the Director of DNR shall adopt rules under IC 4-22-2 to "[e]stablish the method, means, and time of: (A) taking, chasing, transporting, and selling; or (B) attempting to take, transport, or sell; wild animals or exotic mammals, with or without dogs, in Indiana or in a designated part of Indiana." Although this authority is bestowed upon the Director of DNR, IC 14-10-2-4(c) provides that "whenever the department or the director has the authority to adopt rules under IC 4-22-2, the commission shall exclusively exercise the authority."

<sup>10</sup>Indiana places limits on the importation of live coyotes into the state by requiring that an application for a game breeder's license must be applied for within five days after the importation of a coyote into Indiana. 312 IAC 9-10-4(b).



technical corrections set forth in the Administrative Rules and Procedures Act (IC 4-22-2).

## **(2) Creation of an "office of administrative appeal":**

A. Amy Romig, an attorney at the Indianapolis firm of Plews Shadley Racher & Braun, testified before the Committee on October 13, 2008. Ms. Romig testified on behalf of the Environmental Law Section of the Indiana State Bar Association and as an attorney who often represents clients before the Office of Environmental Adjudication (OEA).<sup>11</sup> Ms. Romig expressed concern about any action the General Assembly might take to replace existing adjudicatory bodies such as the OEA and the Natural Resources Commission's Division of Hearings with a centralized "office of appeal." Ms. Romig suggested that administrative law judges (ALJs) drawn from a centralized panel would lack the subject-matter expertise that the "environmental law judges" who currently staff the OEA possess. She also expressed concern that the establishment of a centralized appeals office would compromise the consistency of decision making within particular subject matter areas, resulting in less certainty for regulated entities and other parties to adjudicatory proceedings.

B. John Davis, Deputy Director of the DNR, testified before the Committee on October 13, 2008. Mr. Davis emphasized the value of the expertise provided by ALJs who hear cases from particular agencies or involving particular subject matters. Addressing concerns that ALJs associated with particular agencies may not provide independent judgment when deciding cases, he noted that the two ALJs who currently serve the Commission's Division of Hearings had not worked for the DNR before being hired as ALJs. Mr. Davis pointed out that it is not always the case that agencies hire ALJs from within their own ranks.

C. Mary Davidson, Chief Environmental Law Judge for the OEA, testified before the Committee on October 13, 2008. Ms. Davidson provided anecdotal accounts of her discussions with ALJs in other states that have adopted centralized appeals panels. In attending conferences for administrative adjudicators across the country, Ms. Davidson has talked to ALJs from states with centralized appeals offices established within the executive branch of government. Several of these ALJs have complained that there is often pressure from the administration to reduce the number of cases heard by the appeals office in order to reduce appropriations from the state budget. This pressure, in turn, leads to ALJs scheduling hearings early in the morning or at other times when parties are unlikely to attend, in order to obtain default judgments.

In addition to these anecdotal accounts, Ms. Davidson offered several other reasons why she would discourage the legislature from establishing a centralized office of appeal. She argued that

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<sup>11</sup>The Office of Environmental Adjudication was established by IC 4-21.5-7-3 to review agency actions of the Indiana Department of Environmental Management and actions of the Air Pollution Control Board, the Water Pollution Control Board, and the Solid Waste Management Board.

the OEA and other specialized adjudicatory divisions can offer a level of efficiency and fairness that is not possible when ALJs are drawn from a pool. She noted that consistent opinions ensure that a party in one case is not treated differently from a similarly situated party in another case. Ms. Davidson suggested that such consistency may not be possible when ALJs are assigned to cases from a centralized pool.

## **V. COMMITTEE FINDINGS AND RECOMMENDATIONS**

The Committee voted 6-1 on October 17, 2008, to make the following findings of fact and recommendations:

(1) That disagreement exists among Committee members as to whether the Natural Resources Commission (Commission) exceeded its statutory authority in amending 312 IAC 9-3-12(d) to: (1) provide that a coyote taken on land by the person who possesses the land (or by another person designated in writing by that person) must be euthanized within 24 hours, if the coyote is taken from March 16 through October 14; and (2) place certain restrictions on the possession and disposition of such a coyote. However, Committee members do agree that the Commission's main objective in amending the rule was to prevent the transportation of coyotes across state lines and the attendant risk of the spread of disease. The Committee therefore recommends that the Commission seek to adopt a rule under IC 4-22-2-38 to amend 312 IAC 9-3-12(d) to read as follows:

(d) A person who possesses land, or another person designated in writing by that person, may take coyotes on that land at any time. A coyote taken under this subsection from March 16 through October 14 must be euthanized within twenty-four (24) hours of capture. A live coyote taken under this subsection from March 16 through October 14 shall not be:

- (1) possessed for more than twenty-four (24) hours;
- (2) sold;
- (3) traded;
- (4) bartered; or
- (5) gifted.

(2) That although legitimate concerns exist about the independence of administrative law judges (ALJs) who are employed within a particular agency, there are equally legitimate concerns about the ability of ALJs employed by a centralized office of appeals to provide the expertise needed to adjudicate cases involving highly specialized subject matters. Because all testimony received concerning the possible establishment of a centralized "office of appeal" in Indiana was against such a proposal, and because the testimony received was highly supportive of the state's existing system of administrative adjudication, the Committee concludes that the issue of the creation of a centralized appeals office is "a solution in need of a problem." Accordingly, the Committee recommends that no action be taken by the General Assembly concerning the issue at this time.

## WITNESS LIST

- (1) Colonel Michael Crider, Director of Law Enforcement, Department of Natural Resources
- (2) Mary Davidson, Chief Environmental Law Judge, Office of Environmental Adjudication
- (3) John Davis, Deputy Director, Department of Natural Resources
- (4) Gordon Ingle, attorney, Faith, Ingle & Colone (Corydon)
- (5) Sandra Jensen, Hearing Officer, Natural Resources Commission
- (6) Tim Maloney, Senior Policy Director, Hoosier Environmental Council
- (7) Amy Romig, attorney, Plews Shadley Racher & Braun (Indianapolis)